

**BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2014-346-WS**

IN RE:)
)
Application of Daufuskie Island Utility)
Company, Inc. for Approval of an)
Adjustment for Water and Sewer Rates,)
Terms and Conditions.)
_____)

**DIUC’S RESPONSE TO
INTERVENORS’ MOTION TO
REQUIRE BOND REFORMATION**

On June 9, 2015, over 28 months ago, Daufuskie Island Utility Company, Inc., the sole provider of water and sewer service to a service area that encompasses Daufuskie Island, Beaufort County, South Carolina, (“DIUC”) applied to the Public Service Commission (the “Commission” or “PSC”), for approval of a new schedule of rates and charges for water and sewer service (“the Application”).

Haig Point Club and Community Association, Inc., Melrose Property Owner’s Association, Inc, and Bloody Point Property Owner’s Association (collectively the “Intervenors” or “POAs”) intervened in this case and presented testimony opposing the Application. ORS submitted testimony as well. Prior to hearing ORS and the POAs entered into a Settlement Agreement, which the Commission approved in Order 2015-846 over DIUC’s objection.

DIUC appealed the Order to the South Carolina Supreme Court. While the appeal was pending, DIUC elected to collect revenue as requested by its Application pursuant to S.C. Code 58-5-240. The matter has now been remanded and a rehearing is scheduled for December 5, 2017.

South Carolina Code § 58-5-240 and the DIUC Bonds

South Carolina Code § 58-5-240 sets forth utility rate case filing requirements, deadlines for Commission review of applications, and it establishes the standards applicable to the

Commission's "determination of a fair rate of return ... based exclusively on reliable, probative, and substantial evidence on the whole record." S.C. Code §58-5-240.

Section 58-5-240(D) also explains what a cash-strapped utility may do when, as in this case, the Commission Order does not allow sufficient operational revenue for the utility to survive. Specifically, the statute allows a utility appealing the Commission to put the rates requested in its schedule into effect under a bond to secure repayment to the ratepayers, if necessary. See S.C. Code § 58-5-240(D). The proposed appeal bond "must be in a reasonable amount approved by the Commission, with sureties approved by the Commission, conditioned upon ... refund ... if the rate or rates put into effect are finally determined to be excessive." Id.

In order to keep the Utility operational pending the outcome of its appeal, DIUC required the increased revenue sought by its Application. So, pursuant to S.C. Code §58-5-240(D), DIUC secured an appropriate bond then sought and was granted approval from the Commission regarding the same. The POAs opposed the bond terms proposed by DIUC and requested any bond permitted should be for twice the amount proposed by DIUC. See Resp. to Pet. For Bond, Jan. 18, 2016, and DIUC Reply to Int. Resp. to Pet. For Bond, Feb. 2, 2016.

Reviewing DIUC's initial submission indicating the Utility's intention to implement its requested rates under bond pending appeal, the Commission explained:

Section 58-5-240 provide[s] in part that if the Commission rejects a utility's application for rate relief, the utility may nevertheless choose to impose a rate increase while the utility seeks reconsideration by the Commission of the matter and/or appeal of the Commission's denial of rate relief before the Supreme Court of South Carolina, so long as the utility provides an appropriate surety bond in an amount sufficient to ensure repayment of any overcollection, with interest to be assessed at twelve percent per annum. The Commission is without discretion to prohibit the utility from imposing its proposed rates under an appropriate bond. The statute, as amended by the General Assembly in 1983, allows the utility to impose its proposed rates under bond as a matter of right where the utility demonstrates that the surety and the bond are sufficient to ensure that the

ratepayers will be reimbursed with interest for overcharges in the event the utility's appeal is ultimately unsuccessful.

Commission Order 2016-156, March 1, 2016, at p.4. The Commission went on to find that DIUC's "proposed surety and the bond in the amount of \$787,867, effective July 1, 2016, for a period of one year are appropriate and are approved." Id. at p.5.

As the appeal continued beyond the one-year term of the bond issued pursuant to Order 2016-156, DIUC secured renewal of the existing bond and obtained a second bond in an amount sufficient to address the additional revenues to be collected. This time DIUC and the POAs negotiated then jointly proposed terms and amounts for the appeal bonds in a pleading captioned "Joint Request As To Appeal Bonds (DIUC and Intervenors)" and filed with the Commission on June 15, 2017. The Commission approved the Joint Request.

There are two Orders of the Commission related to DIUC's appeal bonds. They are Commission Order 2016-156 dated March 1, 2016 and Order 2017-402(A) dated June 30, 2017.¹

The cost to DIUC for the initial bond pursuant to Order 2016-156 was \$23,636.00. See Sterling Risk Advisors Invoice, attached hereto as Exhibit A. The cost for the renewal of that bond pursuant to the Joint Request and Order 2017-402(A) was \$19,697.00. See Sterling Seacrest Partners, Inc. Invoice, attached hereto as Exhibit A. The additional bond DIUC purchased pursuant to the agreement with the POAs approved by Order 2017-402(A) cost DIUC \$10,393.00. See Sterling Seacrest Partners, Inc. Invoice, attached hereto as Exhibit A. In total, DIUC spent \$53,726.00 for bonds necessary to allow it to continue operating during the pendency of this appeal. DIUC also had to secure a letter of credit to obtain the final bond, which added an

¹ Order 2017-402(A) replaced Order 2017-402 entered two days prior on June 28, 2017. Order 2017-402(A) is identical to Order 2017-402, except that it corrects a footnote regarding previous intervenor Beach Field Properties, LLC.

additional cost for \$7,055.56 bringing the total bond costs to \$60,781.56.

The POAs' Motion is Hypothetical and Should Be Denied.

The POAs filed the current motion requesting the Commission order DIUC to include additional language in the bonds by either reforming the bonds or renegotiating the bonds. The Motion is premised upon the POAs' concern that under a *potential* scenario the bonding surety *might* take the position that

it is only obligated to pay "*if* the Commission Orders under appeal are...determined to be valid and enforceable." Because the Supreme Court invalidated the "Orders under appeal," DIUC's final rates must now be approved through a *new* Commission Order. The Orders referenced in this provision of the Bonds can, therefore, never be "determined to be valid and enforceable."

Motion at ¶ 3.

The POAs' motion is entirely hypothetical and the asserted need for the motion is only *possible* if multiple contingent and interrelated events transpire in a particular way. The POAs are concerned that:

If this Commission approves rates on remand less than those requested by DIUC;

And if the rates approved are significantly different from those requested by DIUC;

And if that new order is not appealed by DIUC, despite this hypothetical chasm between the amount requested and the amount ultimately ordered;

And if difference between the requested and permitted rates is so great that DIUC cannot cover the required refunds;

And if the bonding company is called upon to assist;

And if the bonding company reads its contract in a particular way which is contrary to the function of the bond itself;

And if the bonding company based on that particular reading refuses to meet its obligations;

And if all efforts, including all legal remedies, fail to obtain the bonding company's compliance and payment fails;

Then And Only Then are the POAs at a *potential* risk of harm;

However, that *potential* risk of harm cannot be quantified in the present because it depends on the occurrence of these many multiple events that are contingent, hypothetical, and abstract.

These scenarios are simply too tenuous and the alleged hypothetical risk is not sufficient to justify the relief requested. Contingent, hypothetical, and abstract potential for harm is not ripe for judicial review. See Colleton County Taxpayers Ass'n v. Sch. Dist. of Colleton County, 638 S.E.2d 685, 694 (S.C. 2006) (“Stated differently, “[a] justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute.”) citing Waters v. S.C. Land Resources Conservation Commission, 321 S.C. at 227, 467 S.E.2d at 917–18 (quoting Pee Dee Elec. Co–Op, Inc. v. Carolina Power & Light Co., 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983)).

Furthermore, even if the Commission were inclined to consider the POA’s claims based upon the occurrence of multiple events that are contingent, hypothetical, and abstract, the POAs have produced no facts upon which the Commission could support a ruling in their favor. The instant motion was not accompanied by any affidavit and no other evidence was cited or incorporated. See Motion at ¶¶ 1-6. As the movant, the burden is upon the POAs to prove legal and factual entitlement to relief and they have failed to present any evidence.

Finally, the POAs participated in drafting and jointly presented to the Commission the June 15, 2017, Joint Request Regarding Appeals Bond. On June 28, 2017, the Commission entered Order 2017-402 approving the Joint Request stating, “After reviewing this matter, we find that the Joint Request for the appeal bond is in the public interest and therefore approved.” The POAs participated in the re-approval of the bond already in place and the issuance of the new bond. Prior

to the Joint Notice of Filing the POAs never objected to or asked for additional language or contingencies be included in the bonds.

DIUC Has Attempted to Assure the POAs.

Although it is under no obligation to contact its bond surety and set forth the POAs' multi-layered hypothetical concerns, DIUC did provide a copy of the Motion to Require Bond Reformation along with the POAs' requested changes to the bond agent who handled the previous transactions. Immediately after receiving a copy of the motion on October 18, 2017, John Guastella forwarded the Motion to the bond company representative explaining:

I'm attaching a motion by the property owners associations that intervened in DIUC's rate case. They are concerned that because the Supreme Court ruled that the PSC's rate order is not valid, the language in the bonds should be reformed so that it is applicable consistent with the rehearing procedure required by the Supreme Court. I suggest that you review the POA's motion to be sure that my description is accurate. Their motion provides specific language revisions that would satisfy their concerns. I would very much appreciate it if you could determine whether the bond company would be willing to accommodate the revisions requested of DIUC's customers. We are under a tight time schedule so a response ASAP would be very helpful.

Email from Mr. Guastella to Mr. Sellers, October 18, 2017, copy attached as Exhibit B. Mr. Guastella then contacted Mr. Sellers by phone multiple times to discuss the matter. Via email dated October 23, 2017, Mr. Sellers ultimately responded:

As we discussed the bond was written and bound several months ago and all parties have accepted the terms.

I have sent the request to change the wording to the underwriter and all that I have received in return was a question.

I thought this was already settled?

Based on this response and short time left on the bond itself. I do not feel that cooperation to change the wording is going to be easily accepted by the bond company.

Email from Mr. Sellers to Mr. Guastella, October 23, 2017, copy attached as Exhibit C.

Conclusion

Since the filing of the motion, the Standing Hearing Officer has revised the hearing schedule in this matter so that the Commission will conduct its hearing on December 5, 2017, allowing the Commission to rule on this matter prior to the end of 2017, when the bond terms expire. Given that schedule and the reasons set forth previously herein, the Motion to Require Bond Reformation should be denied.

Respectfully submitted,

/s/ Thomas P. Gressette, Jr.

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October 26, 2017
Charleston, South Carolina

CERTIFICATE OF SERVICE

This is to certify that on October 26, 2017, I caused to be served upon the counsel of record named below a copy of the foregoing by electronic mail, as indicated.

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